

REDACTED DECISION – DK# 16-073 RP

**BY: CRYSTAL S. FLANIGAN, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JANUARY 17, 2018
ISSUED ON JUNE 12, 2018
CORRECTED DECISION ISSUED FEBRUARY 12, 2019**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

CORRECTED FINAL DECISION¹

On December 21, 2015, the Auditing Division of the West Virginia State Tax Commissioner's Office (hereinafter "Respondent" or "Tax Department") issued a Notice of Assessment, against the Petitioners (hereinafter the "Petitioners" or "Petitioner A). This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment was for personal income tax for the period of January 1, 2011 through December 31, 2014, for tax in the amount of \$ _____, interest in the amount of \$ _____, and additions to tax in the amount of \$ _____, for a total assessed tax liability of \$ _____. Written notice of this was served on the Petitioners as required by law.

Thereafter, on February 12, 2016, the Petitioners timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W.Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

¹ This Corrected Final Decision corrects a typographical error contained in the decision issued on June 12, 2018.

Subsequently, notice of hearing on the petition was sent to the Petitioners, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.²

FINDINGS OF FACT

1. The Petitioners are currently married residents of another State, but were residents of a town in West Virginia during the assessed years.

2. Petitioner A served as a Captain in the United States Public Health Service Commissioned Corps and retired in 2015.

3. Petitioner A receives retirement income from the United States Public Health Service Commissioned Corps.

4. The United States Public Health Service Commissioned Corp is part of the uniformed services.

5. The United States Public Health Service Commissioned Corp is part of the Department of Health and Human Services, but not part of the Department of Defense.

DISCUSSION

The only issue in this matter is whether Petitioner A's retirement income from the United States Public Health Service qualifies as "military retirement income" pursuant to West Virginia Code Section 11-21-12(c)(7)(B). This Code Section provides taxpayers who receive military retirement income a modification as follows:

For taxable years beginning after December 31, 2000, the first \$20,000 of military retirement income, including retirement income from the regular Armed Forces, Reserves and National Guard paid by the United States or by this state after December 31, 2002, including any survivorship annuities, to the extent included in gross income for federal income tax purposes for the taxable year.

W. Va. Code Ann. § 11-21-12(c)(7)(B) (West).

² Chief Administrative Law Judge Harlan held the hearing in this matter on March 31, 2017. However, Chief Judge Harlan has since resigned, and this opinion is being authored by Administrative Law Judge Flanigan.

Petitioner A retired from the United States Public Health Service Commissioned Corp and receives retirement income from it. The Petitioners are attempting to claim the decreasing modification of \$20,000 from their federal adjusted gross income. Petitioner A claims that her retirement income meets the statutory requirements for her to receive the \$20,000 modification. To support this argument, the Petitioners rely upon her 1099-R issued by the United States Public Health Service that states, "Military Pay." Copies of the 1099-R forms were attached to their brief.³ The Petitioners contend that the United States government sees her retirement as military retirement, and therefore, West Virginia should as well.

West Virginia Code Section 11-21-12(c)(7)(B) contains the word "including" and the Petitioners maintain that "including" means to the "expression of one thing to the exclusion of other" under the rules of statutory construction. Under their contention, the persons listed in the statute as being eligible for the modification are not an exclusive list. Thus, they would be eligible to claim the modification.

The Petitioners finally argue that they followed the West Virginia Tax Department's instructions, which stated that they could deduct military retirement income. As Petitioner A's 1099-R lists military pay, and the instructions provide for a deduction, it would be reasonable for them to claim the modification. They further believe that it would be unfair to penalize them for reasonably claiming this modification.

The Respondent concedes that Petitioner A did receive retirement income. However, argues that the issue lies with whether the retirement is considered "military" under the West Virginia Code Section 11-21-12(c)(7)(B). As the term "military" is undefined in the West Virginia Code, the Respondent cites to the United States Code. The term military is undefined but 10

³ The Petitioners did not offer 1099-R forms into evidence during the Evidentiary Hearing.

U.S.C. § 101 defines “armed forces,” as the Army, Navy, Air Force, Marine Corp, and Coast Guard. Uniformed services are defined under the United States Code as (A) armed forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and (C) the commissioned corps of the Public Health Service. 10 U.S.C. § 101 further defines “military departments” as the Department of Army, the Department of Navy, and the Department of the Air Force.

The Respondent claims that the Public Health Service meets the definition of “uniformed services” but does not meet the definition of “military” under the United States Code. The term “uniformed services” includes the term “armed forces” and the Commissioned Corp of the Public Health Service and the National Oceanic and Atmospheric Administration (NOAA). The term “military” is also undefined in the United States Code.

The Respondent avers that the West Virginia Code limits the exemption to only “military retirement income,” which includes “retirement income from the regular armed forces.” The West Virginia legislature did not intend to expand the definition of military to include all uniformed services, but only the armed forces. Furthermore, if the West Virginia legislature wanted a broader interpretation, then uniformed services would already be included in the statute. The federal code appears to classify the United States Public Health Service as part of the uniformed service, but not as a military department or the armed forces.

The Respondent further argues that exemptions are clearly construed against the taxpayer claiming the exemption and the taxpayer must prove they are entitled to the exemption by a preponderance of the evidence under West Virginia Code Section 11-10-25. A modification excluding income from taxation must also be strictly construed against the person claiming the modification. *See* Syllabus Point 5, *Pennsylvania & W.Va. Supply Corp. v. Rose*, 179 W.Va. 317,

368 S.E.2d 101 (1988). As exemptions must be strictly construed against the person claiming the exemption, the strict language of the statute must be respected and not expanded.

The Respondent has agreed to waive the penalties and additions in this matter in response to the Petitioners' claim of being penalized for following the instruction book provided by the Tax Department. However, this waiver does not extend to the Petitioners' underlying tax liability and interest due that is outstanding.

This Tribunal has reviewed the rules of statutory interpretation, and despite the Petitioners' argument about statutory construction, courts do not interpret statutory language when it can be clearly applied as written.⁴ Although the parties in this case disagree about the statute, a disagreement does not render it ambiguous.⁵ Likewise, the lack of a definition does not create an ambiguity.⁶ As military is undefined, we must give the word "its common, ordinary and accepted meaning" as held in syllabus point 6 of *Apollo Civic Theatre, Inc., v. State Tax Com'r*, 223 W.Va. 79, 81, 672 S.E.2d 215, 217 "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be

⁴ "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 279, 719 S.E.2d 747, 749 (2011).

⁵ "Although Davis Memorial and the Tax Commissioner both argue that the language of W.Va. Code 11-15-9(a)(6)(f)(i)(II) is plain, they each assign a different meaning to the statute. This disagreement is not dispositive of the question of whether the statute is plain or ambiguous; we have repeatedly explained that "[t]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning." (internal citations omitted). *Davis Memorial Hosp., v. West Virginia State Tax Com'r.*, 222 W.Va. 677, 671 S.E.2d 682 (2008).

⁶ "legislative silence does not constitute statutory ambiguity." *E.g., Sniffin v. Cline*, 193 W.Va. 370, 374, 456 S.E.2d 451, 455 (1995) (distinguishing between silence and ambiguity of statute interpreted by agency (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))); *Consolidation Coal Co. v. Krupica*, 163 W.Va. 74, 80, 254 S.E.2d 813, 816-17 (1979) (noting distinction between statute that is silent as opposed to statute that is ambiguous (citations omitted)). *See also DeLong v. Farmers Bldg. & Loan Ass'n*, 148 W.Va. 625, 634, 137 S.E.2d 11, 17 (1964) (differentiating between silence and ambiguity in instrument creating joint estate). *Griffith v. Frontier W. Virginia, Inc.*, 228 W. Va. 277, 285, 719 S.E.2d 747, 755 (2011).

given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee–Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982). Syl Pt. 6, *Apollo Civic Theatre, Inc. v. State Tax Com’r*, 223 W. Va. 79, 81, 672 S.E.2d 215, 217 (2008).

An undefined term is first reviewed under a plain meaning analysis. In other words, does the term military have a common, ordinary and accepted meaning? The term military is commonly defined as armed soldiers or armed forces.⁷ As the Petitioner A is not an armed soldier or part of the armed forces, then she would not be part of the military under its common, ordinary, and accepted meaning. The statute further states that the qualifying military retirement income is from the Armed Forces, National Guard, and Reserves, of which Petitioner A is not a member.

Moreover, during the most recent legislative session, the West Virginia legislature proposed the following amendments to West Virginia Code Section 11-21-12(c)(7)(B):

For the taxable year beginning after December 31, 2017, military retirement income, including retirement income from the regular Armed Forces, Reserves and National Guard paid by the United States or by this state after December 31, 2017, including any survivorship annuities, to the extent included in federal adjusted gross income for the taxable year. For taxable years beginning after December 31, 2018, retirement income from the uniformed services, including the Army, Navy, Marines, Air Force, Coast Guard, Public Health Service, National Oceanic Atmospheric Administration

H. B. 4262, 2018 Leg., 83rd Sess. (W.Va. 2018). (Emphasis Added).

Upon review of this proposed legislation to amend and reenact West Virginia Code Section 11-21-12, it’s clear that the legislature intends to include certain uniformed services as being eligible to claim the modification from state income tax. However, these uniformed services were

⁷Dictionary.com defines military as “pertaining to the army or armed forces, often as distinguished by the navy.” <http://www.dictionary.com>.

Merriam Webster’s Dictionary defines military as “of or relating to soldiers, arms, or war... of or relating to armed forces.” <https://www.merriam-webster.com>.

not included in the statute during the time of the Petitioners' assessments. The West Virginia Legislature would not logically need to amend it so that certain uniformed services could receive the modification, if the statute already included the United States Public Health Service.

Furthermore, the United States Public Health Services own website unequivocally states that it differs from the military (armed forces) as follows:

The mission of the Commissioned Corps differs from that of the armed forces (i.e., Army, Navy, Air Force, Marines, Coast Guard) in that the focus is on delivering the Nation's public health promotion and disease prevention programs and advancing public health science. The Commissioned Corps is a non-military uniformed service and Corps officers are not trained in arms. Officers have the flexibility and freedom to ensure they have a diverse and fulfilling career. As an officer in the Commissioned Corps, you may work throughout the U.S. Department of Health and Human Services and in other Federal agencies and programs. In addition, Corps officers have opportunities to participate in voluntary short-term efforts providing public health emergency response and disaster recovery support.

<https://usphs.gov/questionsanswers/overview.aspx>.

Therefore, and for the above discussed reasons, this Tribunal finds that the Petitioners are not entitled to receive the modification at issue, as they do not receive military retirement income in accordance with West Virginia Code Section 11-21-1(c)(7)(B).

CONCLUSIONS OF LAW

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment or refund, the burden of proof is on the Petitioners to show that any assessment of tax or penalty is erroneous, unlawful, void, or otherwise invalid. See W.Va. Code § 11-10A-10(e)(2002), and W.Va. Code R. § 121-1-63.1 (2003).

2. The language of a modification excluding income from taxation must be strictly construed against the person claiming the modification. See Syllabus Point 5, *Pennsylvania & W. Va. Supply Corp. v. Rose*, 179 W.Va. 317, 368 S.E.2d 101 (1988).

3. The decreasing modification is only applicable to military retirement. W.Va. Code § 11-21-12(c)(7)(B).

4. “Disagreement about the meaning of a statute does not itself create ambiguity or obscure meaning.” *Davis Memorial Hosp., v. West Virginia State Tax Com’r.*, 222 W.Va. 677, 671 S.E.2d 682, 688, 693, n.8. (2008).

5. “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982). Syl Pt. 6, *Apollo Civic Theatre, Inc. v. State Tax Com’r*, 223 W. Va. 79, 81, 672 S.E.2d 215, 217 (2008).

6. The term military under West Virginia Code Section 11-21-12(c)(7)(D) is defined as the armed forces under its common, ordinary, and accepted meaning.

7. The Public Health Service is part of the uniformed services, but not part of the armed forces, and therefore, not part of the military. W.Va. Code § 11-21-12(c)(7)(B).

8. The most recent legislature has proposed amendments to West Virginia Code Section 11-21-12(c)(7)(D) as follows:

For the taxable year beginning after December 31, 2017, military retirement income, including retirement income from the regular Armed Forces, Reserves and National Guard paid by the United States or by this state after December 31, 2017, including any survivorship annuities, to the extent included in federal adjusted gross income for the taxable year. For taxable years beginning after December 31, 2018, retirement income from the uniformed services, including

the Army, Navy, Marines, Air Force, Coast Guard, Public Health Service,
National Oceanic Atmospheric Administration

H. B. 4262, 2018 Leg., 83rd Sess. (W.Va. 2018). (Emphasis Added).

9. As the proposed legislation now includes retirement income from the United States Public Health Service, then the Petitioners' assessed years did not include this retirement income.

10. The United States Public Health Service Commissioned Corp is part of the uniformed services and not the armed services pursuant to its own definition. *See* <https://usphs.gov/questionsanswers>.

FINAL DISPOSITION

Based on the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the personal income tax assessments, issued against the Petitioners on December 21, 2015, in the amount of \$_____ be **MODIFIED** to remove the penalties/additions assessed in the amount of \$_____, for a new total liability of \$_____.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. See W. Va. Code Ann. § 11-10-17(a) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Administrative Law Judge

Date Entered